



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

May 22, 1973

Honorable Charles F. Herring
Chairman, Jurisprudence Committee
Texas State Senate
Austin, Texas 78711

Letter Advisory No. 45

Re: Whether Section 3 of
Senate Bill 521, relating
to the liability of school
districts for catastrophic
injuries to pupils, violates
the ex post facto provisions
of Article 1, Section 16 of
the Texas Constitution.

Dear Senator Herring:

You have submitted to us Senate Bill 521, relating to the liability of school districts for catastrophic injuries to pupils, and have asked us to advise concerning the constitutionality of Section 3 and particularly whether it violates the provisions of Article 1, Section 16 of the Texas Constitution.

Basically, the act provides that, if an officer, agent, or employee of a school district, acting within the scope of his employment causes a catastrophic injury to a pupil, the school district shall be liable for all the damages suffered by the pupil in excess of \$15,000.

Section 3 reads:

"APPLICATION OF ACT. This Act applies to any injury for which recovery against the officer, agent or employee of the school district is not barred by limitations on the effective date of this Act."

Section 16 of Article 1 of the Constitution is:

"No bill of attainder, ex post facto law, retro-active law or any law impairing obligation of contracts, shall be made."

The Act would not be a bill of attainder. An ex post facto law pertains to criminal legislation and since S. B. 521 deals with civil liability it would not be an ex post fact law. It would not impair the obligation of any contract. If it violates Article 1, Section 16, it would have to be because it is retroactive.

A retroactive law is one which affects acts or transactions occurring before it came into effect, or rights already accrued, and imparts to them characteristics which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. Highland Park Independent School District v. Loring, 323 S. W. 2d 469 (Tex. Civ. App., Dallas, 1959); 12 Tex. Jur. 2d, Constitutional Law, Section 121, p. 469-70, and cases cited. Though the constitution prohibits retroactive legislation, the courts have held that it is only such retroactive legislation as destroys or impairs vested rights acquired under existing law that is proscribed. Deacon v. City of Euless, 405 S. W. 2d 59 (Tex. 1966); McCain v. Yost, 155 Tex. 284, 284 S. W. 2d 898 (1955), and see Attorney General Opinion H-14 (1973).

It is well established that an independent school district is an agency of the state, and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort, unless the defense of governmental immunity is waived by constitutional or statutory provisions. Braun v. Trustees of Victoria Independent School Dist., 114 S. W. 2d 947, 949 (Tex. Civ. App., San Antonio, 1938, writ ref'd.). The specific question we are thus called upon to answer is whether the defense of governmental immunity is a "vested right" which could not be taken away from a school district. For the reasons hereinafter stated, we conclude that there is no vested right of a school district being impaired or taken away; therefore, Section 3 of the bill does not violate Article 1, Section 16 of the Texas Constitution.

One rationale upon which this conclusion is based is that legislative permission to sue is a matter of procedural as opposed to substantive law and procedural defenses to a cause of action are ~~not~~ vested rights protected under Article 1, Section 16. Commercial Stand. F. & M. Co. v. Commissioner of Ins., 429 S. W. 2d 930, 935 (Tex. Civ. App., Austin, 1968, no writ); Pierce Co. v. Watkins, 114 Tex. 153, 263 S. W. 905 (1924); Williams v. Galveston, 90 S. W. 505 (Tex. Civ. App. 1905, writ ref'd.); Ft. Worth v. Morrow, 284 S. W. 275 (Tex. Civ. App., Ft. Worth, 1926, writ ref'd.);

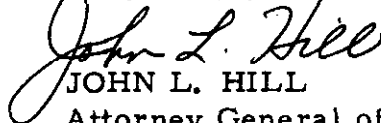
International & G.N.R. Co. v. Edmundson, 222 S.W. 181 (Tex. Comm. App. 1920, holding approved).

A second though more general rationale upon which our conclusion is based is that where a moral obligation exists, the legislature may give it legal effect by a retroactive statute. This maxim has been referred to in upholding the general power of a state to call a liability into being where there was none before, if the circumstances are such as to appeal with some strength to the prevailing views of justice. Danforth v. Groton Water Co., 178 Mass. 472, 59 N.E. 1033; See also cases cited at 16 Am. Jur. 2d Constitutional Law, Section 433, pertaining to retroactive imposition of liability on states and municipal corporations.

Finally, it is a well recognized principle that private rights are those not to be impaired or taken away, as opposed to public, and that consequently a state may constitutionally pass retroactive laws waiving or impairing its own rights or those of its subdivisions. Graham Paper Co. v. Gehner, 59 S.W. 2d 49, 51, 52 (Mo. 1933). See also cases cited at 16 A. C.J.S. Constitutional Law, Section 417.

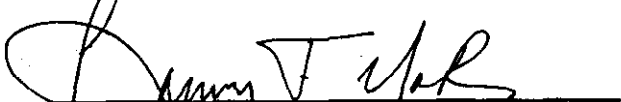
In addition to answering the question asked by the Jurisprudence Committee, we also point out another feature of the section in question. The statute of limitations is tolled while the bar of governmental immunity is asserted. Upon final adoption of the bill the statute of limitations would begin to run on those claims of injury to which the act would apply, and until the limitation period expired, actions could be brought against school districts regardless of the date of the injury made the basis of the claim.


Very truly yours,


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APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee